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No. 709

IN THE

Supreme Court of the United States

OMAR BLAKE ROWLAND, Appellant

versus

THE STATE OF TEXAS, Appellee

Appeal from the Court of Criminal Appeals of the State of Texas

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

REPORT OF OPINIONS

The five opinions in this case have not been officially reported, but are incorporated in the record (R. 54-56, 57-62, 69-75, 83, 84-100) and appear as an Appendix to the Jurisdictional Statement.

JURISDICTIONAL STATEMENT

Jurisdiction of the Supreme Court of the United States attaches, pursuant to 28 U.S.C.A. 1257 (2), because the Act of 1951, 52nd Leg. of Tex., R.S., p. 589, Ch. 346, (codified as Art. 827a, Sec. 8, V.A.P.C. of Texas) hereinafter referred to as "statute," under which Appellant was originally charged, although his conviction was upheld under another statute (Acts 1941, 47th Leg. of Tex., R.S., p. 817, Ch. 506, Sec. 1), is vague, indefinite and inoperative, as Appellant at all times heretofore has contended, under the Constitution and laws of the State of Texas and under the Fourteenth Amendment to the Constitution for the United States and because the conviction, under the circumstances herein, is repugnant to the Constitution for the United States and constitutes a denial of due process of law secured to Appellant by Section 1 of the Fourteenth Amendment thereto.

The question of the vagueness and indefiniteness of the aforesaid statute was duly and seasonably presented in the trial court (R.7), as well as in the appellate court. (R.17)

Final judgment, affirming Appellant's conviction, was entered November 6, 1957. (R.113-114) Motion for Stay of Execution and Enforcement of Judgment was granted on November 7, 1957, allowing a period of ninety (90) days therefrom, in which to perfect an appeal or to petition for a writ of certiorari, (R.118) by the Court of Criminal Appeals of Texas.

CONSTITUTIONAL PROVISION INVOLVED

The Federal constitutional provision involved is

the due process clause of the Fourteenth Amendment to the Constitution of the United States.

QUESTION FOR REVIEW

The question for review is whether the statute, (Acts, 1951, 52nd Leg. of Tex., R.S., p. 589, Ch. 346), under which Appellant was charged—his conviction being affirmed by the Court of Criminal Appeals of Texas under a different, and repealed, statute, (Acts, 1941, 47th Leg. of Tex., R.S., p. 817, Ch. 506, Sec. 1) —is vague, indefinite and inoperative, as Appellant at all times heretofore has contended, under the Constituition of Texas, to-wit, Art. I, Sections 9, 10, 19 and 28, Art. II, Sec. 1, Art. III, Sections 36 and 56 and Art. V, Sections 4 and 5, and Articles 3 and 6, V.A.P.C. of Texas, and Articles 405 and 416, V.A.C.C.P. of Texas, and under Amendment XIV, Sec. 1, to the Constitution for the United States and, further, because the conviction, under the circumstances herein set forth, violates due process of law secured to Appellant by Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF NATURE AND RESULT OF CASE

Appellant was charged with the violation of the aforesaid statute on an information alleging that he operated a motor vehicle

> ". . . at an unreasonable and imprudent speed under the conditions then existing, to-wit, 90 miles per hour, which was then and there a speed greater than was reasonable and prudent on a

public highway of Texas, said highway being a part of the State Highway system and not situated within the limits of an incorporated city or town and on which the State Highway Commission, by an order entered on its minutes, had determined, upon an engineering and traffic investigation, the prima facie reasonable and prudent and safe speed limit applicable, at such time and zone or place, to be 60 miles per hour, as designated and identified by signs erected by the State Highway Commission." (R.5)

Upon conviction thereof he was sentenced to pay a fine of $50.00 and costs, (R.6), to which judgment he excepted and appealed to the Court of Criminal Appeals. Appellant is not now in custody, but is under recognizance in the amount of $250.00, conditioned as required by the law of the State of Texas. (R.40-41)

The Court of Criminal Appeals failed and refused to pass upon the contention of Appellant that the statute, under which he was charged, is vague, indefinite and inoperative under the Constitution and laws of the State of Texas, as well as being repugnant to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

The statute, under attack herein, which Appellant is charged with having violated, is so vague, indefinite and inoperative, under the Constitution and laws of Texas, as conceded by the Court of Criminal Appeals, (R.72), and under the due process clause of the Fourteenth Amendment to the Constitution of the United States, that it cannot stand as a penal statute. As such

it cannot sustain a conviction. It is pointed out that the statute does not fix a definite rate of speed at which a motor vehicle may be driven upon the highways of the State, but the offense, if any, denounced by the statute, is whether the speed at which a motor vehicle may then be driven is reasonable and prudent, or unreasonable and imprudent, under the conditions then existing. When the meaning of "reasonable and prudent" rate of speed is determined, under any given fact situation, the law is thereby for the first time declared.

The record discloses the absence of the concurrence of a majority of the Judges of the Appellate Court, as required by the Constitution of Texas, as to the law applicable herein. The concurrence, necessary to a decision, was only in the result reached, namely, the affirmance of the conviction, without agreeing on the particular statute Appellant is supposed to have violated, other than for the purpose of such affirmance. This action denies the concept of "reasonable doubt" and of "presumption of innocence" to Appellant.

Appellant was charged with the violation of one statute (Act of 1951, **supra**), while his conviction was affirmed under an entirely **different statute** (Act of 1941, **supra**), notwithstanding the fact that the same Appellate Court had previously held that the Act of 1941, **supra**, had been repealed by the later enactment of the Act of 1951. The Act of 1941 has not been revived in the manner prescribed in the Constitution of Texas.

Appellant entered a plea of "not guilty," and presented his defense, to the information charging him

with a violation of the Act of 1951, **supra.** At no time was he charged with a violation of the Act of 1941, **supra,** neither did he plead thereto nor was he called upon to defend himself against any charge based thereon. He had no prior notice, either actual or constructive, of the Act of 1941, **supra,** as making unlawful the acts of which he was accused by information herein.

The statute, which Appellant is charged with having violated, is further unconstitutional because it purports to confer legislative authority upon administrative tribunals, and empower such administrative tribunals to suspend the law or laws, which violates the separate divisions of government provision of the Constitution, embodying the system of checks and balances of the Montesquieu tripartite proposal, as well as the constitutional prohibition against the suspension of laws, except by the Legislature itself.

Also, the Appellate Court completely confused a mere rule of evidence with a rule of substantive law and sought to employ such rule of evidence to make valid an otherwise void and unenforceable statute.

Since peace officers are authorized to arrest without warrant, for traffic violations, and to search the person and vehicle, such authorization, necessarily, presupposes the existence of a valid enactment. No statute or decision exists in Texas authorizing a peace officer to make an arrest or conduct a search upon mere suspicion that an offense has been committed; in fact, an arrest or search under such circumstances is prohibited by the Constitution of Texas.

The violation of the various constitutional and

statutory provisions of the State of Texas, by the affirmance of Appellant's conviction, is repugnant to, and constitutes the denial of, due process of law secured to him by the Fourteenth Amendment to the Constitution of the United States.

PROPOSITION I

A conviction obtained under a vague, indefinite and inoperative statute violates the Constitution of Texas (Art. I, Sec. 19) and the laws of Texas (Art. 3 and 6, V.A.P.C. of Texas and Art. 405 and 416, V.A.C.C.P. of Texas) and denies Appellant due process of law secured by the Fourteenth Amendment to the Constitution of the United States.

AUTHORITIES

Constitution of Texas, Art. I, Sec. 19

Constitution of the United States, Amdmt. XIV, Sec. 1

Art. 3, V.A.P.C. of Texas

Art. 6, V.A.P.C. of Texas

Art. 405, V.A.C.C.P. of Texas

Art. 416, V.A.C.C.P. of Texas

Acts, 1951, 52nd Leg. of Tex., R.S., p. 589, Ch. 346, Sec. 1 (Codified as Art. 827a, Sec. 8, V.A.P.C. of Texas)

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Lanzetta v. New Jersey, 306 U.S. 451, 83 L.Ed. 888, 59 S.Ct. 618

Overt v. State, 260 S.W. 858

Pierce v. United States, 314 U.S. 306, 86 L.Ed. 226, 62 S.Ct. 237

Rowland v. State, (not yet reported) (R.69, 72)

United States v. Cardiff, 344 U.S. 174, 97 L.Ed. 200, 73 S.Ct. 189

Ex parte Wilmoth, 67 S.W. (2d) 289

BRIEF AND ARGUMENT

It has been the consistent holding of the Court of Criminal Appeals of Texas from 1854 until the instant case that a vague, indefinite and uncertain statute is invalid. This holding was required by the Penal Code of Texas, which reads as follows:

> "Art. 6. Unintelligible law not operative. —Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed, or from some other written law of the State, such penal law shall be regarded as wholly inoperative."

The Code of Criminal Procedure of Texas requires that the accusatory pleading shall be "with that degree of certainty that will give the defendant notice of the particular offense with which he is charged . . ." (Art. 405 and 416, V.A.C.C.P. of Texas)

Subsection 1 of the statute involved is set out, in part, as follows:

"Speed restrictions. (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing, having regard to the actual and potential hazards when approaching and crossing an intersection or a railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions; and in every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

"(b) Where no special hazard exists that requires lower speed for compliance with subsection (a) of this Section, the speed of any vehicle not in excess of the limits specified in this subsection or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this subsection or established as hereinafter authorized shall be **prima facie evidence that the speed is not reasonable or prudent** and that it is unlawful:

"(1) Thirty (30) miles per hour in any business or residence district for all vehicles;

"(2) Sixty (60) miles per hour during the daytime and fifty-five (55) miles per hour during the nighttime in locations other than business or residence districts for all vehicles except commercial motor vehicles, truck-tractors, trail-

ers, or semi-trailers as defined in this Act and all motor vehicles engaged in this State in the business of transporting passengers for compensation or hire." (Acts, 1951, 52nd Leg., R.S., p. 589, Ch. 346, Sec. 1) (Emphasis Supplied) (R.69-70)

The majority opinion of the Court of Criminal Appeals, overruling Appellant's Motion for Rehearing, delivered April 3, 1957, (R.72) contains this language:

"The constitutionality of the statute is also questioned on the ground that it is void and unconstitutional because it is vague and indefinite.

"To be consistent with the decisions and reasoning in the prior opinions of this Court we would be required to hold that the basic rule set out in Subsection 1, above quoted, standing alone and without the prima facie speed provisions is so indefinite and of such uncertain construction that it cannot stand as a penal statute. Russell v. State, 88 Tex. Cr. R. 512, 228 S.W. 566; **Parroccini v. State,** 90 Tex. Cr. R. 320, 234 S.W. 671; **Ex parte Slaughter,** 92 Tex. Cr. R. 212, 243 S. W. 478, **Ex parte Carrigan,** 92 Tex. Cr. R. 309, 244 S.W. 604, **Ladd v. State,** 115 Tex. Cr. R. 355, 27 S.W. (2d) 1098; **Ex parte Chernosky,** 153 Tex. Cr. R. 52, 217 S.W. (2d) 673." (Emphasis supplied)

The Court, nevertheless, affirmed Appellant's conviction on the specious theory that the "decisions and reasoning in the prior opinions of this court . . ." are against the weight of authority of "other jurisdictions." The holdings in the cases from "other jurisdictions," however, were **not** based upon the same, or even similar, rules of construction, as was pointed out to the

Court of Criminal Appeals. (R.80) No attempt was made to justify the violation of Article 6, **supra**, or of Article 3 of the Penal Code of Texas, the latter providing:

> "Art. 3. Penalties must be affixed by written law.—In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this State."

The law of Texas is well-stated in the case of **Ex parte Wilmoth**, 67 S.W. (2d) 289, wherein it was held:

> "In Ex Parte Bell, 22 S.W. 1040, 40 Am. St. Rep. 778, this court held that an offense denounced by either statute or ordinance must be plainly written to be effective. In other words, a complete law, if penal in its effect, must define the action or omission denounced as criminal with some degree of certainty. Ex Parte Leslie, 223 S.W. 227."

The penal law of Texas, on the question of vagueness and indefiniteness, is complete within itself, as admitted by the Court of Criminal Appeals, (R.72) and the Court had **no** right to "appeal" to "other jurisdictions" to overthrow the settled law of Texas, thereby depriving Appellant of "the due course of the law of the land" secured to him by the Constitution and laws of Texas. (Art. I, Sec. 19, Articles 3 and 6, V.A.P.C., Articles 405 and 416, V.A.C.C.P.)

When the meaning of **"reasonable and prudent"**

rate of speed is determined, under any given fact situation, the law is thereby for the first time declared.

In **Champlin Refining Company v. Corporation Commission**, 286 U.S. 210, 76 L.Ed. 1062, 52 S.Ct. 559, 86 A.L.R. 403, Mr. Justice Butler quotes this language from **Connally v. General Construction Co.**, 269 U.S. 385, 70 L.Ed. 322, 328, 46 S.Ct. 126, which is pertinent to the issue in the instant case:

> **"And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."** (Emphasis supplied)

No doubt this language prompted Judge Davidson, in his second able dissenting opinion herein, in referring to the fact that the sole and only act made unlawful by the Act of 1951 is the driving of a vehicle on a highway "at a speed greater than is reasonable and prudent under the conditions then existing" to write, that the statute, (Act of 1951) "is so vague, indefinite and uncertain as to render that part of the statute invalid and wholly inoperative because men of common intelligence must guess as to what is meant by 'a speed greater than is reasonable and prudent under the conditions then existing,' and differ as to its application." (R.87)

Any offense denounced by the statute **depends** upon the **"conditions then existing."** If the "conditions then existing" do not render, or make, the rate of speed unreasonable or imprudent, there exists no statute to be violated. The "conditions then existing," at the

time and place the vehicle is driven, are an essential element, and part of the offense, without which it cannot be said that a law has been violated or that there exists a law which makes those acts unlawful. (R.87-89)

In the case of **Overt v. State**, 260 S.W. 858, the Texas Court of Criminal Appeals was considering the Net Container Act which required that certain packaged goods, such as flour, meal, rice, etc., commonly known to be subject to variations in weight, dependent on climatic and atmospheric conditions, and which Act provided a penalty for selling, or exposing for sale, such commodities when the net weight of the package is not plainly and accurately marked thereon.

The correct weight was plainly marked on the package of flour when it was packed, but after 23 days storage in a dry warehouse it weighed 7 oz. less. The moisture content had diminished but the food value was unaffected. Each day in the warehouse saw a **change**—however slight—in the weight of the sack of flour as the surrounding circumstances applied.

In determining the validity of the aforesaid Act, the Court of Criminal Appeals held that:

> "The Act is so vague, indefinite and of doubtful construction and therefore obnoxious to the terms of Articles 2 and 6 of our Penal Code. To be upheld as law any legislative act must not be so indefinitely framed or of such doubtful construction as that it cannot be understood, whether such defect arises from the language in which it is expressed or from some other written law of the State. Failing to measure up to this standard, any act is wholly inoperative."

Continuing, the Court wrote:

> "What we have said suffices to make it plain that in our opinion the material parts of this law are unintelligible, harsh, oppressive, incapable of enforcement and as depriving citizens of property without due process of law."

The reasoning, and result reached, in the **Overt** case, **supra,** are applicable to the instant case in which the operation of a motor vehicle, "at a greater speed than is reasonable and prudent," is made **unlawful, only,** when committed at a particular time and under special circumstances and conditions. To attempt to penalize him who drives a motor vehicle at a greater speed than is "reasonable and prudent" would place before such operator the choice of being punished often and continually, or else quitting operating a motor vehicle on the highways of this State.

The case of **Lanzetta v. New Jersey,** 306 U.S. 451, 83 L.Ed. 888, 59 S.Ct. 618, is directly in point as supporting Appellant's contention.

The statute of the State of New Jersey purporting to define a "gangster" (Laws of 1934, Ch. 155, Sec. 4) was held to be repugnant to the due process clause of the Fourteenth Amendment to the Constitution for the United States because of its vagueness and uncertainty.

Mr. Justice Butler, for the Court, wrote:

> "If on its face the challenged provision is repugnant to the due process clause, specifications of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the

rule to govern conduct and warns against transgression.

> "No one may be required, at peril of life, liberty or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Thus, in the case at bar, it is only by speculation or conjecture that the meaning of the statute may be determined.

In the case of **United States v. Cardiff**, 344 U.S. 174, 97 L.Ed. 200, 73 S.Ct. 189, Mr. Justice Douglas used this language:

> "The vice of vagueness in penal statutes is the treachery they conceal, either in determining what reasons are included or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."

In **Pierce v. United States**, 314 U.S. 306, 86 L.Ed. 226, 62 S.Ct. 237, the Supreme Court held:

> "A judicial enlargement of a criminal act by interpretation is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness."

The two cases last above cited involved Federal Statutes, and not State Statutes, nevertheless, the reasoning and discussions thereof are applicable to the State statute herein involved.

While the State of Texas is a "code" State, as differentiated from a "common law" State, as mention-

ed in the **Pierce** case, **supra**, nevertheless, Article 6 of V.A.P.C. incorporates the idea of the common law requiring that crimes must be defined with appropriate definiteness by providing that an "unintelligible law is not operative" and that the accusatory pleading shall be "with that degree of certainty that will give the defendant notice of the particular offense with which he is charged . . ."

Failing and refusing "To be consistent" with the foregoing provisions of the Constitution and laws of the State of Texas and "with the decisions and reasoning in the prior opinions" of the Court of Criminal Appeals, and holding the statute herein to be invalid, constitutes the denial of due process of law to Appellant as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

PROPOSITION II

Affirmance of a conviction, without the concurrence of a majority of the Appellate Court, on the law applicable, in violation of the Constitution of Texas (Art. V, Sections 4 and 5), is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

AUTHORITIES

Constitution of Texas, Art. V, Sections 4 and 5
Constitution of the United States, Amdmt. XIV, Sec. 1

BRIEF AND ARGUMENT

The Constitution of Texas provides that "The Court of Criminal Appeals shall consist of three Judges, any two of whom shall constitute a quorum, and the **concurrence** of two Judges shall be necessary to a decision of said court . . ." (Art. V, Sec. 4), also that "The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases of whatever grade . . ." (Art. V, Sec. 5). (Emphasis Supplied)

The three so-called majority opinions in this case disclose that the only "concurrence . . . necessary to a decision . . .," was in the **result** reached, the affirmance of Appellant's conviction, and **not** as to the law applicable.

The first opinion written by a Commissioner and adopted by a majority of the Court of Criminal Appeals affirmed Appellant's conviction under a statute which he was **never** charged with having violated and upon which **no** information was ever filed, namely, the Act of 1941, **supra**. (R.54-56). The third member of the Court dissented from such decision. (R.57-62).

On motion for rehearing (R.64-68) the Commissioner's opinion was set aside, in an opinion by Judge Woodley, wherein it was held that "we have decided that we should consider the question of the validity of Appellant's conviction as under the 1951 Act." (R.69)

After admitting that "To be consistent with the decisions and reasoning in the prior opinions of this Court we would be required to hold that the . . . (Act

of 1951) is so indefinite and of such uncertain construction that it cannot stand as a penal statute . . .," (R.72), the opinion concluded by overruling Appellant's contention that the statute (Act of 1951) is vague and indefinite and affirmed the conviction thereunder. (R.75)

Appellant thereupon presented his Second Motion for Rehearing (R. 78-82) which a majority of the Court overruled (R.83) and affirmed the conviction under the Act of 1941, **supra,** (R.83), although Appellant had not been charged with its violation, such opinion expressing doubt as to the soundness of the reasoning employed in the opinion, by Judge Woodley, affirming the conviction under the Act of 1951, **supra,** to which last affirmance, however, Judge Woodley agreed, although he had previously held otherwise, as to the applicable statute (R.69-75, 83), which is a rather anomalous situation, with Appellant's liberty and property in peril. Likewise, to this final opinion and action by the majority of the Court, the third, and remaining, member entered his dissent in clear and vigorous language sustaining Appellant's contentions throughout, as well as interposing additional grounds of unconstitutionality of the statute. (R.84-100)

Since the judgment of affirmance of Appellant's conviction should have been based on the "concurrence" of at least two Judges, of the the three-Judge Court, **on the law applicable,** rather than just to reach a **result,** as an attribute of sheer power, it is obvious that the aforesaid constitutional provision requiring such was violated, thus denying Appellant due process of law secured to him by the Fourteenth Amendment. Also such action denies the accepted concept of "rea-

sonable doubt," and of the "presumption of innocence," to Appellant.

PROPOSITION III

Affirmance of Appellant's conviction under a different statute than that which he is alleged to have violated; of which he had no notice, either actual or constructive, of its existence, making unlawful the acts of which he was accused; there being no information charging him thereunder; with no opportunity afforded accused to plead and to defend himself against any charge thereunder and no copy of any accusation thereunder being furnished him, is a violation of the Constitution of Texas (Art. I, Sec. 10 and 19, Art. III, Sec. 36) and is repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

AUTHORITIES

Constitution of Texas, Art. I, Sec. 10

Constitution of Texas, Art. I, Sec. 19

Constitution of Texas, Art. III, Sec. 36

Constitution of the United States, Amdmt. XIV, Sec. 1

Art. 405, V.A.C.C.P. of Texas

Art. 416, V.A.C.C.P. of Texas

Acts, 1941, 47th Leg. of Tex., R.S., p. 817, Ch. 506, Sec. 1

Acts, 1951, 52nd Leg. of Tex., R.S., p. 589, Ch. 346, Sec. 1 (Codified as Art. 827a, Sec. 8, V.A.P.C. of Tex.)

Hernandez v. State, 248 S.W. (2d) 749

BRIEF AND ARGUMENT

Article I, Sec. 10 of the Texas Constitution provides that "In all criminal prosecutions the accused . . . shall have the right to demand the nature and cause of the accusation against him and to have a copy thereof . . ." The same Constitution also provides that "No citizen of this State shall be deprived of life, liberty, property, privilege or immunities . . . except by the due course of the law of the land." (Art. I, Sec. 19)

This case presents the **unusual** situation of a criminal prosecution having been instituted against Appellant charging the violation of the **Act of 1951, 52nd Leg. of Tex., R.S., p. 589, Ch. 346** (R.5), for which he was convicted (R.6), and such conviction being affirmed on the basis of **another, and entirely different,** and, in fact, **superseded, statute,** namely, the **Act of 1941, 47th Leg. of Texas, R.S., p. 817, Ch. 506, Sec. 1,** even though he was **not** charged with its violation.

The record herein is unique as the chronology discloses:

(a) Appellant was charged and convicted of violating the **Act of 1951, supra.** (R.5-6).

(b) Conviction affirmed based on the **Act of 1941, supra,** (R.54-56) which had been superseded.

(c) Dissenting opinion. (R.57-62)

(d) Appellant's Motion for Rehearing (R.64-68), overruled (R.76) and conviction affirmed under **Act of 1951, supra.** (R.69-75)

(e) Appellant's Second Motion for Rehearing (R.77-82), overruled (R.101) and conviction affirmed under **Act of 1941, supra.** (R.83)

(f) Dissenting Opinion. (R.84-100)

(g) Legality of statute and conviction herein not determined. (R.57)

That Appellant's civil rights, guaranteed by the Constitution and laws of Texas, as well as by the Constitution of the United States, have been denied and violated with impunity, admits of no question.

The following quotation is from the first dissenting opinion herein:

> "This Court was created for the purpose of furnishing to one convicted of crime a tribunal to which he might appeal for a determination of the legality of that conviction.
>
> "By this appeal, Appellant claimed that the conviction was erroneous and should not be permitted to stand, for two reasons, as follows: (a) The statute under which this conviction was obtained is unconstitutional and void and (b) The information did not allege violation of the law because the statute upon which it is based is void.
>
> "My brethren affirm this conviction without determining either of these contentions.

"If the right of appeal means anything at all, surely it means that Appellant is entitled to have this Court either sustain or overrule his contentions when those contentions are properly before this Court for determination.

"The action of the majority of this Court in affirming this conviction without passing upon the contentions presented by the appeal is indefensible and inexcusable. It deprives this Appellant of his constitutional right of appeal." (Emphasis Supplied) (R.57)

In dissenting, Judge Davidson expressed the opinion that the **Act of 1951, supra,** "is void for the reasons assigned by Appellant," (R.59) also, that the **Act of 1941, supra,** is subject to the same constitutional objections, although Appellant had no opportunity to present such.

The affirmance of this conviction, **based on the Act of 1941, supra,** is violative of Appellant's right to have a copy of the State's accusatory pleading (Const. of Tex., Art. I, Sec. 10) which must be ". . . with that degree of certainty that will give the defendant notice of the particular offense with which he is charged . . ." (Art. 405 and 416, V.A.C.C.P. of Texas)

Appellant was charged, under the **Act of 1951, supra,** (R.5) was found guilty, and sentence was imposed thereunder. (R.6) The validity of this statute was challenged in the trial court and in the motion for new trial, (R.7) which was overruled, (R.8) and the appeal prosecuted to the Court of Criminal Appeals which had jurisdiction. (R.6) (Const. of Tex., Art. V, Sec. 5)

At no time, from the institution of the charge until the opinion of affirmance was delivered, on January 30, 1957, did Appellant have any notice that his conviction would be considered, much less affirmed, under another and different statute, to-wit, the **Act of 1941, supra,** than that under which he was charged.

"If the Act of **1951** was **valid,** then the Act of **1941** was, in all things, invalidated and superseded. If the Act of **1951** was invalid, then the Act of **1941** was repealed, because that law was in conflict with the Act of **1951,**" (R.60), which latter Act contained an express repealing clause, as well as a severability clause. **(Act of 1951, supra)**

The Court of Criminal Appeals previously held that the **Act of 1951** had **superseded** the **1941 Act,** in the case of **Hernandez v. State,** 248 S.W. (2d) 749, hence, another cogent reason why the majority opinion herein is wrong in affirming the conviction thereunder. (R.83)

The acts charged in the information were not made unlawful by the Act of 1941 and the affirmance of the conviction for an offense as a violation of the Act of 1941 is done **without** an information which, in any manner, complies with Art. I, Sec. 10 of the Constitution of Texas.

This poses the question, which Appellant duly and seasonably presented, as to which Act must be followed in attempting to charge an offense in such cases. Should an alleged offender be charged under the **Act of 1951** or the **Act of 1941**? How are County and District Attorneys to determine which Act to invoke, in

view of the record herein? Such **Act of 1941** had not been revived under Art. III, Sec. 36 of the Constitution of Texas, nor is it so claimed. No law shall be revived by reference to its title. To revive it would require it to be re-enacted and published at length.

By affirming Appellant's conviction under the Act of 1941, such Act being invoked for the **first** time in the Appellate Court, surely is a violation of the provisions of Art. I, Sec. 10, as well as denying the due course of law of the land (Art. I, Sec. 19, Const. of Texas) by depriving him of his right to be informed of the charge against him, all of which is repugnant to due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

PROPOSITION IV

Legislative authority may not be delegated to, and the power to suspend laws may not be exercised by, administrative tribunals and to do so, in violation of the Constitution of Texas, is repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

AUTHORITIES

Constitution of Texas, Art. I, Sec. 28

Constitution of Texas, Art. II, Sec. 1

Constitution of the United States, Amdmt. XIV, Sec. 1

BRIEF AND ARGUMENT

The Constitution of Texas provides for the complete separation of the powers of government into legislative, executive and judicial departments, and forbids the encroachment of one upon the other, (Art. II, Sec. 1) and, further, that "No power of suspending laws in this State shall be exercised except by the Legislature." (Art. I, Sec. 28)

These are recognized as fundamental principles of American constitutional jurisprudence.

It is attempted, by the Act of 1951, **supra,** to delegate legislative authority and functions to administrative tribunals, specifically, to the State Highway Commission, in that the Commission is empowered to determine and fix the speed at which motor vehicles may be operated on the public State highways.

The Act of 1951, also, sought to confer upon the State Highway Commission the power to suspend the law, contrary to the constitutional provision set out.

These questions, although vital, and duly and seasonably presented, were ignored by the majority opinions of the Court of Criminal Appeals herein.

Only the Legislature has the constitutional power and authority to prescribe, by statute, the acts and conduct that are unlawful in this State and to prescribe the rules of evidence by which an accused is to be tried for his life or liberty in the courts of Texas.

It is obvious that the Legislature of Texas has not

performed that function or exercised its proper legislative powers herein. Rather, it has delegated to administrative tribunals, such as the State Highway Commission, the right to perform that legislative function. The Act of 1951, **supra**, purports to confer upon the State Highway Commission, the County Commissioners' Courts and the governing bodies of cities and towns, the unlimited right to reduce the prima facie speed at which motor vehicles may be operated over the highways, roads and streets, under the respective jurisdiction of such agencies, and, in so doing, it authorized and conferred upon those tribunals the right not only to **suspend**, but to **destroy**, any statute it had written fixing the maximum speed limit within the prima facie evidence rule, in direct contravention of the aforesaid constitutional provisions. (R.93)

Thus, under the Act of 1951, **supra**, the State Highway Commission, an administrative tribunal, is empowered to make a law, i.e., to fix the speed limit, rather than the Legislature itself, since the Commission is authorized and empowered to "alter prima facie speed limits," prescribed by the Legislature. It can **raise** the limit, as well as lower it.

The information alleged, inter alia, that . . . "the State Highway Commission . . . had determined . . . the prima facie reasonable and prudent and safe speed limit applicable . . . designated and identified by signs erected by the State Highway Commission."

Under that allegation the State relied, **not** upon the prima facie rate of speed as designated by the **Legislature of Texas**, but upon the prima facie speed that the **State Highway Commission** fixed, applied and

designated for that particular time, zone or place.

Therefore, since the information alleged that **the State Highway Commission had fixed the prima facie speed limit, under the authority conferred upon it, the statutory speed limit, is not invoked and may not be relied upon by the State to sustain this conviction.**

The assertion, in one of the majority opinions, that "The Legislature has provided a 60 miles per hour maximum speed . . ." is wholly incorrect and unfounded. (R.71) This same opinion, delivered April 3, 1957, also states that "the allegation that the State Highway Commission **also** had determined that 60 miles per hour was reasonable and prudent added nothing to and subtracted nothing from the State's pleading" thereby holding such allegation to be surplusage. (**Note,** the word "also" in the last preceding quotation from such opinion (R.71) — underscored for emphasis — which throws a different meaning on the language, **does not appear** in the information in this case.) (R.5)

To reach the conclusion that such allegation is surplusage, and thus avoid deciding the questions of unlawful delegation of legislative authority to and the illegal suspension of law by, administrative tribunals, the Court of Criminal Appeals, apparently, was **compelled** to adopt an incorrect statement—totally unjustified and unwarranted—by the Act of 1951, **supra,** for **nowhere** therein is a maximum speed limit prescribed and no one knows this better than the Court of Criminal Appeals.

Apparently, the writer of the aforesaid majority opinion of the Court of Criminal Appeals, Judge Wood-

ley (R.69-75) completely and utterly confused a rule of evidence with a rule of law. The statute—**Acts of 1951, supra**—specifically provides that, under certain conditions and circumstances, **any speed in excess of the limits** specified or established, as hereinafter authorized, (by administrative tribunals) **shall be prima facie evidence** that the speed is not reasonable or prudent and that it is unlawful. This rule has reference, and applies, **only,** to the mode or manner by and through which facts essential to the conviction might be established.

"Prima facie evidence means evidence which is sufficient to establish the fact, unless rebutted; evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. **Ratliff v. State,** 25 S.W. (2d) 343, **Uptmore v. State,** 32 S.W. (2d) 474." (R.91)

Under no circumstances, then could prima facie evidence be the medium through which a substantive rule of law could be promulgated or defined.

> "Being a rule of evidence, only, there must exist some fact issue upon which the rule might operate which necessarily presupposes, in a criminal case, an accusation under a valid statute and issues of fact joined.
>
> "As I have heretofore pointed out, there is, here, no valid statute regulating the speed of motor vehicles, and therefore there could exist no prosecution.
>
> "The prima facie evidence rule must be here construed as an act of the legislature prescrib-

ing a rule of evidence applicable in prosecutions arising under a void statute.

"The statute, in attempting to define an offense, being void, no occasion or fact issue could therefore . . . arise whereby the prima facie evidence rule could be applied or resorted to.

"To ascribe and give to the prima facie evidence rule the effect of making a law or of making valid a statute which would otherwise be void would be contrary to one of the cardinal principles of statutory construction — which is that of legislative intent.

"Had the Legislature of this State (Texas) intended to fix a definite speed limit in this State, it could very easily have said so. There would have been no occasion for the legislature to have relied upon intendment or supposition to accomplish that purpose. So the fact that the Legislature did not fix a definite speed limit evidences its intention not to do so. The prima facie evidence provision of the Statute cannot be given the interpretation that it fixes a definite limit at which motor vehicles may be operated in this State. To so hold would be contrary to the Legislative intent and would constitute judicial legislation.

"The whole of the statute (Art. 827a) shows that the Legislature never intended that the prima facie evidence feature thereof be considered or deemed as fixing speed limits in this State.

"Regardless of the construction that is to be given to the prima facie evidence feature of the statute—that is, whether it is a rule of evi-

dence only or a substantive law denouncing an offense—the fact remains that the legislature has delegated to administrative tribunals and agencies the right to fix the prima facie evidence rule." (R.91-92)

The direct violation of the aforesaid provisions of the Constitution of Texas constitutes a denial of due process of law secured to Appellant by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

PROPOSITION V

Special laws are prohibited by the Constitution of Texas, and their enactment, in violation thereof, is repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

AUTHORITIES

Constitution of Texas, Art. III, Sec. 56

Constitution of the United States, Amdmt. XIV, Sec. 1

BRIEF AND ARGUMENT

Art. III, Sec. 56 of the Constitution of Texas prohibits the passage of a special law except as may be otherwise provided in the Constitution.

The statute involved herein is a special law in that the operation of a motor vehicle at a greater speed

than is reasonable and prudent is made unlawful **only** when committed at a particular time and under special circumstances and conditions.

An act committed in a given circumstance or condition can occur but once. The same act, committed at some other time or place, would not be the same, because circumstances and conditions have changed. The statute in this case is, therefore, a special law, making unlawful an act committed only at one time and, then, under special conditions and circumstances. Being a special law, it contravenes the aforesaid provisions of the Texas Constitution and, by the affirmance of the conviction, under such statute, Appellant is denied due process of law, secured to him by Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

PROPOSITION VI

An invalid statute, purporting to regulate the speed of motor vehicles, will not authorize arrest without warrant and the right to search the person and vehicle, and an arrest under an invalid statute, violates the Constitution of Texas and is repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

AUTHORITIES

Constitution of Texas, Art. I, Sec. 9

Constitution of Texas, Art. I, Sec. 19

Constitution of the United States, Amdmt. XIV, Sec. 1

Art. 216, V.A.C.C.P. of Texas

Brown v. State, 159 Tex. Cr. R. 306, 263, S.W. (2d) 261

Burton v. State, 152 Tex. Cr. R. 444, 215 S.W. (2d) 180

Gill v. State, 134 Tex. Cr. R. 363, 115 S.W. (2d) 923

Giocona v. State, 298 S.W. (2d) 587

Moore v. State, 107 Tex. Cr. R. 24, 294 S.W. 550

Richardson v. State, 294 S.W. (2d) 844

BRIEF AND ARGUMENT

Art. I, Sec. 9, of the Constitution of Texas expressly prohibits unreasonable seizures and searches.

The Legislature of Texas has authorized peace officers to arrest for traffic violations, without warrant, and the Court of Criminal Appeals has held that such statute applies to speed violations. (Art. 216 V.A.C.C.P. of Texas) The right to arrest carries with it the right to search the persons and the vehicle. **Richardson v. State,** 294 S.W. (2d) 844; **Brown v. State,** 159 Tex. Cr. R. 306, 263 S.W. (2d) 261.

There is no statute or decision, however, which authorizes a peace officer to make an arrest or a search upon mere suspicion, belief and opinion that an offense has been committed; an arrest or search under such conditions is prohibited. **Gill v. State,** 134 Tex. Cr. R. 363, 115 S.W. (2d) 923; **Burton v. State,** 152 Tex. Cr.

R. 444, 215 S.W. (2d) 180; **Moore v. State,** 107 Tex. Cr. R. 24, 294 S.W. 550; **Giocona v. State,** 298 S.W. (2d) 587.

"Applying those rules here, it is apparent that if Art. 827a (Act of 1951, supra) is a valid statute, making it a violation of the speed laws of this state for one to operate a motor vehicle at an unreasonable and imprudent speed then a peace officer may arrest and search upon mere suspicion and belief, because the existence of an unlawful speed law depends, **first,** upon the supposition, opinion, idea and belief of the peace officer and, **secondly,** upon the supposition, opinion, idea and belief of the peace officer that the facts constitute a violation of that statute." (R.95)

If the statute is void for indefiniteness, as Appellant contends, it could not and would not furnish the medium for an arrest. If it be construed as a valid law, regulating the speed of motor vehicles, then it is void because it authorizes an arrest and search upon mere suspicion and belief, in violation of the constitutional provision aforesaid. Therefore, the violation of Art. I, Sec. 9, Const. of Tex., prohibiting unreasonable seizures and searches, under the circumstances herein, constitutes a denial, to Appellant, of "the due course of the law of the land" provided in the Const. of Tex. (Art. I, Sec. 19) and is repugnant to due process of law, secured to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

It is not the degree of importance of a case, per

se, or the type of punishment imposed, that either does or should direct the action of any court, hence, for that reason Appellant submits his contentions to this Court, believing that he has been wronged and his rights violated by the final judgment of the Court of Criminal Appeals of Texas.

The principles and concepts of American constitutional liberty and jurisprudence loom large in this case. In no case examined by the writer does there appear more violations of fundamental rights of an accused than appear in the instant case.

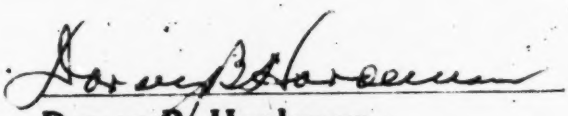
The Court of Criminal Appeals did not pass upon the constitutionality of the statute involved herein, which was the sole and only issue in the case, and which was duly and seasonably presented both in the trial court, as well as in the Appellate Court, thereby effectually, depriving Appellant of his constitutional right of appeal which, as said by the dissenting Judge, "is indefensible and inexcusable." (R.57)

This Honorable Court is, therefore, called upon to rectify and right the basic wrongs done a citizen of the United States and of the State of Texas by the court of last resort of Texas having jurisdiction therein.

WHEREFORE, premises considered, Appellant prays that this Honorable Court (a) determine the constitutionality of the statute which he is charged with violating, (b) the legality of the affirmance of his conviction under another and different, and repealed, statute, and (c) to remand the case to the Court of

Criminal Appeals of Texas for disposition in accordance with the orders and action herein and for such other orders as to this Honorable Court may seem proper.

Respectfully submitted,



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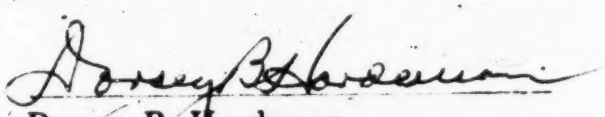
A copy of this brief and argument has been mailed to the Attorney General of the State of Texas at his office in Austin, Texas.



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